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No. 90-3

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In the Supreme Court of the United States

OCTOBER TERM, 1990

HOWARD L. WOLF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the perjury count in the indictment sufficiently apprised petitioner of the illegal acts with which he was charged.

2. Whether petitioner's statements before the grand jury were literally true and therefore could not be the predicate for a perjury conviction.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 869 F.2d 1288.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1989. A petition for rehearing was denied on May 15, 1990. Pet. App. 23a. The petition for a writ of certiorari was filed on June 28, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the Western District of Washington, petitioner was convicted on one count of making false

declarations before a grand jury, in violation of 18 U.S.C. 1623. He was sentenced to a term of imprisonment of a year and a day.[1] The court of appeals affirmed. Pet. App. 1a-16a.

1. On February 18, 1985, the United States Forest Service advertised that an estimated 8,100,000 board feet of timber in northwestern Washington would be auctioned by competitive bidding. The sale was known as the "Up and Adam" timber sale and was scheduled for March 22, 1985. The Forest Service set $515,728 as a minimum acceptable bid, and it provided that, following the opening of the sealed bids, the bidders could make oral bids for the timber. Pet. App. 2a-3a, 26a.

Although Portac, Inc., petitioner's employer, was not permitted to bid on the timber because it was affiliated with a log exporter (Pet. App. 4a), the company was interested in purchasing logs from the sale for its sawmill. Toward that end, petitioner had conversations prior to the sale with Dean Hurn of Hoh River Timber, Inc. (Hoh), and also with a buyer from Astoria Plywood Corporation (Astoria), to determine whether those companies intended to make a bid at the auction. Tr. 133-135, 174, 304-305. Then, on the morning of the sale, petitioner spoke with Hurn, who told him that he was going to bid on the sale for Hoh, and that Seattle-Snohomish Mill Co. (Seattle-Snohomish) was also going to the sale because it wanted some of the logs. Tr. 136, 139-140. Petitioner and Hurn also discussed Astoria's interest in the sale, and petitioner reiterated Portac's interest in obtaining some of the wood. According to Hurn's testimony, petitioner offered his "blessings" on Hurn's plan

[1] Portac, Inc., petitioner's employer, was convicted as well, on charges of aiding and abetting the formation of a conspiracy in unreasonable restraint of trade, in violation of 15 U.S.C. 1. Portac was required to pay a $200,000 fine.

to try to make "a deal" with Astoria on the sale, and if no agreement could be reached, to make a bid on Hoh's behalf. Pet. App. 4a, 7a; Tr. 138-140, 145, 173-174. Petitioner also facilitated Hurn's meeting with Astoria by calling Astoria's timber manager, Norm Axon, and telling him to meet with Hurn the morning before the sale. Pet. App. 13a; Tr. 243-244, 268-269.

On the morning of the sale, Axon and Hurn met with Neill Bowman of Seattle-Snohomish in the parking lot in front of the Forest Service office. Bowman told Hurn that he wanted logs from the sale and that if he did not reach an agreement to provide logs, he would place a bid for the timber. The three buyers then reached an agreement, under which Astoria would buy the timber, Hoh would receive the hemlock from the sale, and the fir would be evenly divided among Astoria, Portac, and Seattle-Snohomish. Pet. App. 4a.

The bidding then proceeded in accordance with the agreement. Hoh and Seattle-Snohomish bid $515,728, the minimum acceptable amount, and Astoria bid $20.50 above the minimum. Although oral bids were allowed following the unsealing of the written bids, none of the three companies made an oral bid. The evidence at trial established that Hoh had originally been prepared to bid up to $791,000. Pet. App. 3a.

The same day, Hurn spoke to Portac's president, C.C. Pittman, told him what had been "agreed to," and advised him that, as a result of the agreement, Portac would be receiving some of the wood. Pet. App. 4a; Tr. 150-151. Hurn also told petitioner that he had talked to Axon about the sale and that Portac "would be able to buy logs off of it." Tr. 373-374.[2] Ultimately, however, Hoh and Portac

[2] Calls billed to petitioner's credit card were made to both Axon's and Bowman's residences within minutes of each other on the evening after the sale. Tr. 292.

did not receive any logs from the sale. Pet. App. 4a. After a grand jury began to investigate the timber sale, Axon told Hurn that he was not going to carry out the agreement. *Id.* at 4a-5a. Hurn thereafter conveyed that information to petitioner. *Id.* at 14a.

2. On June 12 and August 7, 1986, petitioner testified under oath before a federal grand jury that was investigating bid-rigging on Forest Service timber in Washington State. Although he knew of the buyers' agreement involving the Up and Adam timber sale, petitioner gave the following answers to questions asked by the prosecutor (Pet. App. 5a):

> Q. Do you know whether or not Mr. Hurn had any contact with a representative of Astoria Plywood prior to the Up and At 'Em [sic] timber sale?
>
> A. No.
>
> Q. Do you have any reason to believe that he did?
>
> A. No.
>
> * * * *
>
> Q. Has anybody ever told you that a sale was rigged?
>
> A. No.

The indictment charged that each of those answers was false. The jury found that the last two answers violated 18 U.S.C. 1623. Pet. App. 5a.

3. The court of appeals affirmed petitioner's conviction. Pet. App. 1a-16a. The court rejected petitioner's contention that the indictment was insufficiently specific because it lacked a paragraph detailing the truth of the matters about which petitioner had allegedly given false testimony. The court explained that petitioner had responded with a categorical "no" to the questions posed, and that the indictment had clearly alleged that those answers were false. *Id.* at 12a. The court noted that in light of the questions and answers, "the opposite truth is apparent without the need

for a particular averment." *Ibid.* The court also rejected petitioner's claim that the question about what he had "reason to believe" was too ambiguous to support a conviction. *Id.* at 13a. It noted that the meaning of that question must be considered in context, and it explained that "the issue is whether persons of ordinary intelligence could agree on the meaning of the language or use it with mutual understanding." *Ibid.* The court concluded that the question "was quite understandable." *Ibid.* Finally, the court held that the evidence was sufficient to sustain petitioner's conviction. *Id.* at 13a-14a.

ARGUMENT

1. Petitioner was convicted on the basis of his answers to two questions before the grand jury, the first of which asked whether he had "any reason to believe" that Hurn had met with Astoria prior to the timber sale. Petitioner contends (Pet. 8-18) that that question was ambiguous and insufficiently specific, and that his conviction should therefore be reversed. That claim is meritless.

In the first place, the jury found that petitioner had given false testimony in response to a second question as well. See Pet. App. 41a.[3] Petitioner does not, however, challenge the clarity of that question. Because, as the court of appeals observed (*id.* at 14a), petitioner's conviction can be sustained on the basis of his false answer to the second question alone, there is no reason to review his challenge to the first question.

In any event, the first question was sufficiently specific and unambiguous. As the court of appeals explained (Pet. App. 12a-13a), the question was clear and unambiguous, particularly in light of the immediately preceding question,

[3] The question was: "Has anybody ever told you that a sale was rigged?" Petitioner's answer was: "No." Pet. App. 5a.

which asked whether petitioner knew of any contact between Hurn and Astoria before the timber sale. To each of those questions, petitioner responded with a categorical "no." Thus, when the indictment alleged that this statement was false, it clearly informed him that the government would seek to show that petitioner had reason to believe that Hurn had contacted Astoria prior to the Up and Adam sale. Moreover, the indictment went on to allege, in a "truth" paragraph, precisely why petitioner knew that the statements he had made to the grand jury were false.[4] Because the indictment contained such a "truth" paragraph, there is no merit to petitioner's request (Pet. 12-15) that this Court resolve an asserted conflict concerning whether such a "truth" paragraph is required.[5]

2. Petitioner contends (Pet. 18-19) that his negative answers were literally true and therefore could not sustain

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[4] Paragraph 6 of the indictment stated (Pet. App. 37a):

> The aforesaid declarations of Howard L. Wolf as he then and there knew, were false in that * * * he had knowledge or information about communications, agreements, or bid rigging between and among representatives of bidders on United States Forest Service timber sales, including Dean Hurn of Hoh River Timber, Inc. and Norman Axon of Astoria Plywood Corporation, pertaining to the March 22, 1985 United States Forest Service Up and Adam timber sale, or reason to believe that such communications or agreements took place * * *.

[5] Even if the indictment had omitted the truth paragraph, however, there would be no reason to address the circuit conflict asserted by petitioner. The cases that petitioner cites from the Third and Sixth Circuits (see Pet. 12-15) stand merely for the proposition that a truth paragraph is necessary where the questions and answers are insufficiently clear. See, *e.g.*, *United States* v. *Tonelli*, 577 F.2d 194, 196-200 (3d Cir. 1978); *United States* v. *Eddy*, 737 F.2d 564, 570-572 (6th Cir. 1984). See also *United States* v. *Qaoud*, 777 F.2d 1105, 1114 (6th Cir. 1985), cert. denied, 475 U.S. 1098 (1986). For the reasons noted above, the questions put to petitioner before the grand jury were entirely clear, and his answers were unambiguously false.

a perjury conviction. At bottom, that claim is simply an attack on the sufficiency of the evidence. As the court of appeals explained (Pet. App. 13a-14a), the evidence readily supported the jury's conclusion that someone had "told" petitioner that the sale was rigged, and that petitioner had "reason to believe" that Hurn met with Astoria before the sale. In particular, the evidence showed that petitioner had advised Axon, Astoria's timber manager, to meet with Hurn before the sale, and that Hurn had told petitioner of his plan to reach a pre-bidding agreement with Astoria, if possible. The evidence also showed that following the sale, Hurn had informed petitioner of Axon's decision to terminate the agreement because of the pending grand jury investigation. *Ibid.* The court of appeals' factbound conclusion that that evidence was sufficient warrants no further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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